SUPREME COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 177

MARY A. LOSCHI, MARGARET CIANCI, MARY PASCUCCI, JAMES A. MIRAGLIA, PHILENA McWHINNIE, SAMUEL BAPTISTA, MARY C. OLIVER,

PETITIONERS,

v.

MASSACHUSETTS PORT AUTHORITY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, comprising (1) the owner-occupants of residential property that constituted part of the land taken by the respondent for an airport runway extension and "clear zone" therefor, and (2) the owner-occupants of residential

property that will be in immediate proximity to the runway as extended, petition this Court to issue a writ of certiorari to review the decree of the Massachusetts Supreme Judicial Court in *Loschi & others* v. *Massachusetts Port Authority*, 1968 Mass. Adv. Sh. 437, 234 N.E. 2d 901, upholding the taking as to the first class of petitioners, and holding that neither class of petitioners have standing to contest the validity of the rest of the taking.

Opinion Below

The opinion of the Massachusetts court is appended hereto as Appendix A, p. 18, *infra*.

Jurisdiction

The opinion of the Massachusetts court was filed on March 11, 1968, and the final decree after rescript entered in the Superior Court of Massachusetts on March 21, 1968. All copy of the decree is appended hereto as Appendix B, p. 29, *infra*.

This court has jurisdiction to review the judgement of the Massachusetts Supreme Judicial Court by writ of certiorari under the provisions of 28 U.S.C. § 1257 (3).

Questions Presented

(1) Whether, under the due process clause of the 14th Amendment, the owner-occupants of residential properties that abut property taken for an airport runway extension have standing to challenge the validity of intervening takings that will bring the runway and its "clear zone" into immediate proximity with their properties and result in a taking of their properties under the doctrine of *United*

States v. *Causby*, 328 U.S. 256 and *Griggs* v. *Allegheny County*, 369 U.S. 84.

(2) Whether, under the due process clause of the 14th Amendment, the owner-occupants of residential properties taken for an airport runway extension, have standing to challenge the validity of intervening takings, where the taking of their properties would not be required by federal safety standards if the intervening takings are invalid.

(3) Whether, (a) as the state court held, a grant of money by the Federal Aviation Agency for an airport runway extension upon application by an airport authority, *ipso facto* constitutes the establishment of a federal safety standard, and if so, (b), whether persons whose properties, the taking of which is thereby justified, have been denied their right, under the due process clause of the 14th Amendment, to be heard before the federal rule-making agency on the promulgation of such standard.

Statement Of The Case

The petitioners are owner-occupants of properties in a long established, thickly settled residential area of East Boston, Massachusetts. (R. 33). Their properties lie generally north-westerly of Runway 15-33 of the General Edward Lawrence Logan International Airport. (R. 32, 33). Title to the airport and operation and control thereof are vested in the Massachusetts Port Authority, the respondent. (R. 32).

Runway 15-33, which is utilized for instrument landing of turbo-jet aircraft (R. 33), has been at all times pertinent to this action, 7,873 feet in length. (R. 33). The axis of the runway is almost exactly on a line with, and the west end of its present clear zone not more than 1600 feet from the most remote of, petitioners' properties. (1968 Mass. A.S. at 439; 234 N.E.2d at 903 (R. 5)).

In the years 1962 and 1963, and earlier, the respondent pursued studies bearing upon an extension of Runway 15-33 to 10,000 feet in length. The proposed extension contemplated an additional paved portion of 2,127 feet. (R. 35). In May, 1963 the respondent submitted to the Federal Aviation Agency a project application for the extension. (R. 41). By 49 U.S.C. § 1108(d)(1) the F.A.A. administrator may approve a project application only upon condition that the applicant "have legal authority to engage in the . . . development as proposed" and "hold good title" to the site. The respondent gave assurance, in its written application, that it would acquire title to certain designated properties, which are those of the petitioners Loschi, Cianci and Pascucci. (R. 42). And in June, 1963, a grant offer was made by the F.A.A. to the respondent and accepted by it. (R. 42, 43).

The premises of all petitioners are more than 2,500 feet westerly of the existing 7,873 foot runway and are not within the "clear zone" required by any federal regulation applicable to the runway at its present length. (R. 45). No property of any of the petitioners was required or necessary, therefor, for a runway clear zone of 2,500 feet, for runway 15-33 at its present length. (R. 41). If extended to 10,000 feet in accordance with the proposal, however, the properties of the petitioners Loschi, Cianci and Pascucci, will all be within the required clear zone. The property of other petitioners on the same street will not, (R. 33, 45-46), but will abut or be in immediate proximity to it.

In September, 1963, the respondent took by an express order of eminent domain the properties of the petitioners Loschi, Cianci and Pascucci. (R. 4). No property of any other petitioner was made subject to any express order of taking.

If runway 15-33 is extended to 10,000 feet as proposed, the Loschi, Cianci and Pascucci properties will mark the

western terminus of the runway "clear zone". Intermediate between these properties and the present runway, are other properties, constituting a portion of Boston Harbor, and Wood Island Memorial Park. (1968 Mass. Adv. Sh. at 439, 234 N.E. 2d at 903). Petitioners' properties abut the latter. *(Ibid.)* The west end of the runway itself as extended would enter Wood Island Memorial Park. *(Ibid.)*

All petitioners brought suit in the Superior Court of Massachusetts seeking a declaratory judgment of the invalidity of the proposed extension, and raising three principal challenges: (1) that the taking of land lying westerly of the present property line of the airport was in violation of Mass. Acts 1963, c. 410, (appended hereto as a part of Appendix C. p. 31, *infra*), passed with an emergency preamble and effective May 16, 1963, and which provided that the Authority "shall not, except for the purpose of protecting the aerial approaches to runways in accordance with applicable federal standards, meeting runway clear zone requirement of the federal government, . . . or meeting other air safety requirements of the federal government, acquire by the exercise of the power of eminent domain for airport purposes any land . . . westerly of the present property line of the . . . [a]irport"; (2) that the extension through a portion of Boston Harbor was in violation of the harbor line established in 1939; and (3) that the destruction of trees and other measures taken by respondent in respect to Wood Island Memorial Park was in violation of Mass. Acts 1949, c. 431 placing the park within the jurisdiction and control of the Metropolitan District Commission, a state agency, and in violation of a requirement that all warrants for contract and awards with respect to the park be approved by the governor and governor's council.

The harbor line, now changed by Mass. Acts 1966, c. 733, is no longer in issue in the case.

The respondent demurred on four grounds, the first of

which was "that none of the persons named as a petitioner in the bill or petition has any standing in equity . . . to question the legality of this respondent's entry upon or use of Wood Island Park, so called." (R. 25-26).

The case was referred to a master (R. 31) who made findings of fact. An interlocutory decree, sustaining the respondent's demurrer, *inter alia,* on the first ground asserted, and a final decree dismissing the complaint, were entered and affirmed by the Supreme Judicial Court. (1968 Mass. Adv. Sh. at 445, N.E. 2d at 907).

The opinion of the court held: (1) that all petitioners were without standing to seek equitable relief concerning Wood Island Park, (1968 Mass. Adv. Sh. at 443-444, 234 N.E. 2d at 906); and (2), reversing the master's finding "that neither said sponsorship [by the F.A.A.], nor the said grant agreement arising pursuant to said sponsorship, became 'applicable federal standards' as set forth in Chapter 410 of the Acts of 1963" (R. 58) as to the petitioners (Loschi, Cianci and Pascucci) whose land was subject to the express order of taking, that:

> "[t]he requirements of the 1963 grant agreement that the land be acquired, taken with the project of extending the runway bring the takings ordered on August 8, 1963, within the exceptions to the prohibitions of St. 1963, c. 410."

(1968 Mass. Adv. Sh. at 443, 234 N.E. 2d at 906), that is to say, that the 1963 grant agreement constituted a federal standard.

Reasons For Granting The Writ

THIS CASE PRESENTS IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW NOT PREVIOUSLY DECIDED BY THE COURT.

I.

The first issue concerns petitioners Miraglia, McWhinnie, Baptista and Oliver, as they are owner-occupants of properties abutting property taken for a runway extension.

The extension will bring the runway itself into close proximity to their residential properties, and the runway "clear zone" into immediate proximity with their properties.

One question sought to be reviewed as to them is, therefore, whether 14th Amendment due process requires that those who will become victims of a taking under the doctrine of *United States* v. *Causby*, 328 U.S. 256 and *Griggs* v. *Allegheny County*, 369 U.S. 84, have standing to challenge the validity of the intervening takings.

In *United States* v. *Causby*, 328 U.S. 256, the Court held that the United States, by low flights of its military planes over a chicken farm constituted a taking in a constitutional sense of an easement for which compensation had to be paid where such flights made the property unusable for their purposes. And in *Griggs* v. *Allegheny County*, 369 U.S. 84, the Court extended the holding in *Causby* to a municipal airport by holding that a county which owned and maintained the Greater Pittsburgh Airport had taken an air easement over petitioner's property. The property involved there was 3,250 feet from the end of a runway and close under the "approach area" of low landing and takeoff flights of commercial aircraft.

If the intervening takings in the instant case are valid, a *Causby* and *Griggs* situation will arise with respect to these

petitioners. The petitioners', Miraglia, McWhinnie, Baptista and Oliver, properties are on Neptune Road in East Boston. Property of three of their neighbors, (Loschi, Cianci and Pascucci) also on Neptune Road and abutting property in Wood Island Memorial Park was expressly taken by an order of the respondent in August, 1963. As relevant here, the petitioners have sought to assert the invalidity of the taking of the Wood Island Park property. If that intervening taking is valid, and the runway extended as proposed, the Miraglia, McWhinnie, Baptista and Oliver properties will be, serially, next adjacent to the 2500 "clear zone" from the end of the runway as extended.

That runway is utilized for instrument landing of turbo-jet aircraft, and, as the master also found, "the use of said runway 15-33, as *presently* constructed, for turbo-jet aircraft, has caused the enjoyment of the said premises of these petitioners for the purposes of habitation to be impaired seriously." (R. 44) (emphasis supplied).

The extension of the runway to 10,000 feet from its present 7,883 feet would place its end 2,127 feet closer to each of petitioners' properties, and place them from directly abutting to within 1600 feet of the clear zone. See map, 1968 Mass. Adv. Sh. at 439, 234 N.E. 2d at 903, and directly and immediately under the approach path of the turbo-jet aircraft involved here. If the intervening express takings are valid and the runway is extended into Wood Island Memorial Park as contemplated, unquestionably a *Causby* and *Griggs* situation will arise as to these petitioners.

The issue of whether they have standing to contest the validity of the Wood Island Memorial Park taking is the issue of whether they have standing to seek to prevent a *Causby* and *Griggs* situation from arising as to them, that is, whether they have standing to challenge the taking of

property other than their own when the result of such taking will be to render their homes completely uninhabitable.

Petitioners contend that they have a direct and immediate, personal and pecuniary interest in challenging the intermediate taking, that they have a right to do so under the 14th Amendment to the United States Constitution and that they have been deprived of that right.

This is not a case where petitioners are seeking to assert third parties' rights. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535-536; *McDonald* v. *United States*, 335 U.S. 451, 456; *Barrows* v. *Jackson*, 346 U.S. 249, 257-260 (and cases cited); *Griswold* v. *Connecticut*, 381 U.S. 479, 481. As in each of these cases, petitioners are seeking to vindicate rights of their own, here to protect their property from a *Causby-Griggs* type taking and to do so they must have standing to challenge the legality of the intervening taking.

With respect to petitioners' right to challenge the taking of Wood Island Memorial Park, the opinion of the Massachusetts court, in denying them standing, remitted them to seeking relief by applying to the Attorney General. "The proper public office to protect park land by bill in equity is the Attorney General. [citing cases]." (1968 Mass. A.S. at 444, 234 N.E. 2d at 906). But petitioners' interest in the illegal intervening taking was not simply that of the public in general in the preservation of a recreation area, for two reasons:

First, the value of their own properties derives in each instance in part from their being abutters to a park, i.e., in immediate proximity to a recreation area.

The destruction of the park results in an impairment of the value of their properties. And if their properties are to be taken, either expressly, or, as seems more likely, under the doctrine of the *Causby* and *Griggs* cases, the value *at the time of that taking* will have been reduced beforehand by the destruction of the park.

Secondly and more importantly, petitioners ought not to be foreclosed merely because the intervening land taken was a recreational area in which the public generally had an interest. The interest which petitioners assert is one peculiar to them: the pre-taking diminution of the value of their property from the encroachment onto nearby land of the airport. And that interest would be the same if the illegally taken property was a factory or a warehouse. That it is a public park is fortuitous, and that fortuity ought not to remit them to a remedy designed only to redress the public wrong without taking into account the peculiar injury petitioners are about to suffer.

Petitioners are, in short, asserting an immediate pocketbook interest.

The question is one that ought to be decided by this court. *Causby* and *Griggs* established that there may be a taking by frequent and noisy low level flights over one's property. They recognized that a runway on one's doorstep, or a glidepath immediately over one's chimney constitutes harm — a serious interference with a person's enjoyment of his property. The issue here is whether persons imminently threatened with such harm have the right to seek to prevent it from arising, by asserting that the takings which would bring the airport to their doorstep are illegal. *Causby* and *Griggs* established the remedy of damages for the taking. But persons ought not to be compelled to sit idly by while the harm impends. They should have standing to assert that intervening takings which, if legal, will visit the harm on them, are in fact illegal. They should have the right to show in a court of law the illegality of the intervening takings and prevent the destruction of their properties.

II.

With respect to their standing to challenge the intervening taking the petitioners Loschi, Cianci and Pascucci are in a somewhat different position. They are the owners of properties specifically taken by an express order of the Authority (August of 1963), as distinguished from a *Causby* and *Griggs* type taking. If the runway is extended, their property will constitute a portion of the "clear zone" of the runway as extended, and they will obviously no longer have any concern with the noise and vibration of planes overhead.

But the validity of the express takings of their properties depends upon whether they are necessary to comply with federal safety standards, and they would be if, and only if, the extension into Wood Island Memorial Park is valid.

The Supreme Judicial Court held that the exception in c. 410 permitting westward extension only to meeting federal safety standards was not "confined . . . to existing runways" but applied to "new or extended runways." (1968 Mass. Adv. Sh. at 443, 234 N.E. 2d at 906). And admittedly these petitioners' properties would be within the "clear zone" required by federal standards if the runway were extended as contemplated.

But on the issue of the validity of the Wood Island Memorial Park taking for such extension, the Supreme Judicial Court held that these petitioners too had no standing to be heard.

The validity of the taking of these petitioners' properties hinges, therefore, on the validity of the intervening takings and on that focal issue, the state court held petitioners had no standing. If the respondent could not legally take Wood Island Memorial Park and complete the exten-

sion westward, it would not be necessary to take petitioners' properties to meet federal safety standards.

The question, then, as to petitioners Loschi, Cianci and Pascucci, is whether the due process clause of the 14th Amendment gives them the right to challenge the legality of the takings which, if legal, validate the taking of their own properties. If the intervening takings are invalid, these takings would necessarily fall with them.

III.

A. Related to the issue of standing, there is an important federal question raised, relating to what constitutes a federal safety standard, particularly, whether a grant agreement between the F.A.A. and an airport authority constitutes *ipso facto* such a standard. This question relates only to those petitioners (Loschi, Cianci, and Pascucci) whose properties were subject to the express order of taking of August, 1963. The decision of the Massachusetts Supreme Judicial Court held in substance the taking of their properties to have been required by federal safety standards, and that the grant agreement constituted a federal standard.

The Federal Airport Act, as amended (49 U.S.C. § 1101 et seq.) provides, in part, that approval of a project—and the extension of a runway is a "project" within the meaning of the act. See § 1101(3)(5)—shall be given by the Administrator of the Federal Aviation Agency only upon condition, *inter alia*, that the airport authority making the application "have legal authority to engage in the airport development as proposed : . ." and "holds good title, satisfactory to the Administrator, to the landing area of such airport or the site therefor, or gives assurance satisfactory to the Administrator that such title will be acquired." 49 U.S.C. § 1108(d)(1).

When these properties were taken, Mass. Stat. 1963 c. 410, in turn, prohibited the Authority from extending westward, "except for the purpose of protecting the aerial approaches to runways in accordance with applicable federal standards, meeting runway clear zone requirements of the federal government . . . or meeting other air safety requirements of the federal government . . ."

At the time of the taking, in August, 1963, no federal standard required the extension of the runway westward to any extent whatever.

As the master found and the Supreme Judicial Court did not question, (1) petitioners' premises are all more than 2,500 feet westerly of the present 7,873 foot runway and are not within the "clear zone" required by any applicable regulations; (2) none of the structures on their premises rise to the slope requirements for an approach area to the present runway; and (3) there was no obligation on the part of the airport authority to extend the runway westerly.

In short, the end result of this federal-state-federal *renvoi* is that, unless the grant agreement itself constituted a federal safety standard, no federal standard required the taking of petitioners' properties.

The question then became whether the grant agreement itself, i.e., F.A.A. approval of the airport's request for funds to construct the runway extension, constituted, *ipso facto*, the establishment of a federal safety standard. The Supreme Judicial Court held that it did.

The grant agreement, said the court,

> "shows that the purpose of the Neptune Road land acquisition was to protect the aerial approach to Runway 15-33 from the northwest . . . The requirements of the . . . agreement that the land be acquired, taken with the project of extending the runway, bring the

takings . . . within the exceptions to the prohibition of St. 1963 c. 410."

1968 Mass. Adv. Sh. 443, 234 N.E. 2d at 906.

State law in this instance defers to federal law. Indeed if federal law required a particular extension to facilitate interstate commerce, state law could not prevent it. See *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 723-724. The Massachusetts statute, therefore, merely recognizes the supremacy of federal law in this commercial matter. Extension westward is permitted by state law only if required by applicable federal standards, that is, by standards which have as their constitutional basis the interstate commerce clause. The Supreme Judicial Court held that the grant of money upon application by the Authority constituted, *ipso facto*, a federal standard, and permitted the westward extension. It held, in effect, that westward extension was *required* by federal law.

Conversely, federal law, title 49 of the U.S. Code, conditions the grant of money upon the legality of the project under state law. The grant is not simply a matter of an agreement between the F.A.A. and the airport authority; it becomes a matter in which these petitioners have a direct and immediate interest once it is held, as the Supreme Judicial Court did, that the agreement constitutes a federal safety standard which sanctions the takings of their properties. The petitioners would have had no standing, of course, to question the propriety of the grant agreement. But once the grant agreement is held to constitute a standard justifying injury to them, they have the right to be heard, and in this court if necessary. The event which gave them their right to be heard was the decision of the Massachusetts court. They cannot now go before the F.A.A. as interested parties to be heard on this ruling.

Indeed the F.A.A. did not establish it. The Massachusetts court did, and their decision establishes, at least as to these petitioners, a federal standard just as surely as if it were promulgated by the F.A.A.

The matter does not become one exclusively of state law because only westward extension is prohibited by the statute. It is only westward of the airport that there are habitated areas; the airport is otherwise surrounded by the sea. Nor does the matter become one exclusively of state law because *any* extension in habitated areas is prohibited, or because *any* extension might have been prohibited. It is not, in short, exclusively a state law matter because a state law curbs expansion. Federal law permits expansion only if legal under state law. Massachusetts here, by construing a state statute, also construed federal law as to what constitutes a federal safety standard.

That federal question was wrongly decided by the state court. A grant of money upon an application by an authority does not by itself establish a federal standard. The arrangement between the F.A.A. and the airport here did not purport to be a federal standard. None of the indicia of the promulgation of a standard—notice, hearing, publication—obtained with respect to this grant.

With respect to rule-making the F.A.A. rules themselves provide for public notice and entitlement of each interested person to be heard. Sec. 11.29 of its rules, 14 C.F.R., Part 11, provides for general notice of a proposed rule to be published in the Federal Register. Under secs. 11.31 and 11.33, 14 C.F.R. Part 11, each interested person is entitled to participate in rule-making proceedings by submitting written information, views, or arguments, and, if it serves the purpose of a particular proceeding, may be allowed to make oral arguments, participate in conferences with the Administrator, and appear at informal hearings.

The decision of the Supreme Judicial Court on this point

notes that the master's report was "more restrictive in its discussion of negotiations for the runway extension than would have been helpful" (1968 Mass. Adv. Sh. at 442, 234 N.E. 2d at 905, but the fact is that the evidence reported was all there was on the point. But even had the negotiations been extensive, they would still not have constituted the establishment of a federal standard, or substituted for the regular methods of promulgating standards, on which these petitioners would have had the right to be heard.

B. The Supreme Judicial Court of Massachusetts does not make rules for the Federal Aviation Agency. Nor does it make adjudicative decisions for it. Only the F.A.A. itself can do these, and only if and after the appropriate administrative process has been followed.

If a grant agreement itself creates a federal safety standard, then petitioners, the taking of whose property is justified by that standard, have a right to be heard on its promulgation. 5 U.S.C. § 1003; 14 C.F.R. §§ 11.29, 11.31, 11.33. If the issue is conceived as involving an adjudicative procedure, that is to say, involving the question whether petitioners properties are such as may be taken to satisfy a federal standard, the same right to be heard obtains. 5 U.S.C. §§ 1004-1006. As interested and affected parties, that is their federal right. See *Londoner* v. *City and County of Denver*, 210 U.S. 373, 386; *American Air Transport, Inc.* v. *Civil Aeronautics Board*, 98 F. Supp. 660 (D. Ct. D.C.); 344 U.S. 4; *Air Line Pilots Ass'n* v. *Quesada*, 276 F.2d 892, 896 (2nd Cir. 1960) cert denied 366 U.S. 962; Davis, Administrative Law Treatise, § 7.01. There is no indication whatever that the F.A.A. intended to short-circuit that right, for there is no indication whatever that the agency conceived of or intended its grant agreement with respondent to constitute the promulgation of a federal safety standard. The decision of the Ma[illegible]ru-

setts court did what the agency could not have done. It could not promulgate a standard without notice and hearing in accordance with well established modes of federal administrative procedure.

This is not to say that Massachusetts cannot interpret federal law or even interpret it wrongly. The crux of this issue is simply this: Before their properties were made subject to the respondent's order of taking in August of 1963, petitioners had two protections: (1) the existence of a Massachusetts statute, St. 1963 c. 410, prohibiting westward extension except to comply with federal safety standards; and (2) the absence of any federal safety standard that would require or permit the taking of their properties. By establishing, and retroactively applying, by its decision, a federal safety standard requiring the taking of petitioners' properties, the Massachusetts court has effectively eliminated an avenue of redress that would have been used by petitioners had the F.A.A. desired to establish a federal safety standard that would endanger their homes.

Conclusion

The questions presented here transcend this case. The right of property owners to contest intervening takings which, if valid, will necessarily result in a taking of the *Causby-Griggs* type or at the very least serious diminution of the value of their property, is one that may arise any time an airport anywhere extends its runways and clear zones to accommodate ever larger aircraft. Petition for a writ of certiorari should be granted.

Respectfully submitted,

VINCENT A. CELESTE
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Appendix A

OPINIONS OF THE SUPREME JUDICIAL COURT
Published under authority of Chapter 402 of Acts of 1935

MARY LOSCHI & others *vs.* MASSACHUSETTS PORT AUTHORITY.

Suffolk. February 5, 1968. — March 11, 1968.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, CUTTER, & KIRK, JJ.

Logan International Airport. Eminent Domain, Validity of taking, Airport. *Parks. Equity Jurisdiction*, Parks. *Equity Pleading and Practice*, Parties.

Suit in equity heard in the Superior Court by *Beaudreau, J.*, on demurrer and on a master's report.

CUTTER, J. Owners of land in East Boston seek declaratory relief concerning the Authority's eminent domain takings (by order of August 8, 1963) of land near Neptune Road, East Boston, for the Logan International Airport. Their principal contention is that the Authority has taken land lying "westerly of the present property line of the . . . [a]irport" in violation of St. 1963, c. 410. An appeal from an interlocutory decree sustaining the Authority's demurrer now presents only the issue whether the plaintiffs have standing to question the use of Wood Island Park (mentioned below) for airport purposes. A master's report on other phases of the case was confirmed. By final decree, it was declared that the properties mentioned in the order of August 8, 1963, were validly taken, as permitted by St. 1963, c. 410, "for the purpose of protecting the aerial approaches" to Runway 15-33 "in accordance with ap-

plicable federal standards," and "for the purpose of meeting runway clear zone requirements of the federal government." The plaintiffs appealed.

The Authority is responsible for the "control, operation and maintenance" of the airport. St. 1956, c. 465, § 5. It may "extend . . . [and] improve . . . the projects under its control" and may acquire by purchase or by eminent domain under G.L. c. 79 "such . . . lands . . . as it may deem necessary for carrying out the provisions of" the 1956 statute. See c. 465, § 3 (g) and (k). The Authority's powers are to be construed liberally. *Massachusetts Port Authy.* v. *Clerk of the East Boston Dist. Court,* 350 Mass. 195, 202. By St. 1963, c. 410, it was provided that the Authority "shall not, *except for* [A] *the purpose of protecting the aerial approaches to runways in accordance with applicable federal standards,* [B] *meeting runway clear zone requirements of the federal government,* providing for the installation of navigational and landing aids required by the federal government, or [C] *meeting other air safety requirements of the federal government,* acquire by the exercise of the power of eminent domain for airport purposes any land above mean high water in the East Boston district of the city of Boston [D] *westerly of the present property line* of the . . . [a]irport . . ." (emphasis supplied).[1]

The area in East Boston (near and at the airport), concerning which this controversy arises, is shown on the accompanying plan. The plaintiffs owned land (marked by a bracketed [B] at the left side of the plan) on the southwest side of Neptune Road. Neptune Road is separated from the main airport runways by World War Memorial Park,

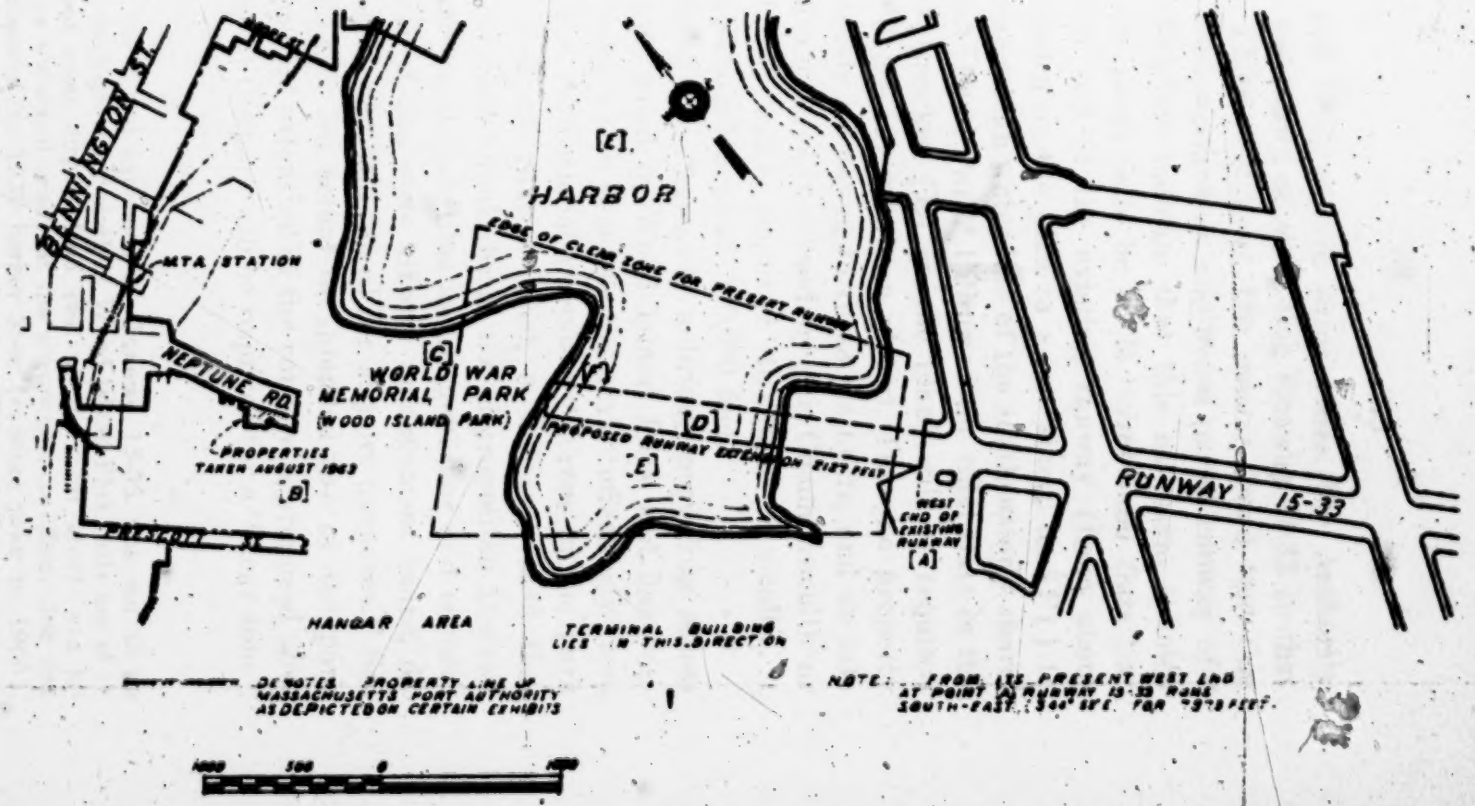
[1] The letters in brackets are inserted for convenience of reference to the italicized language following such letters. Statute 1963, c. 410, was repealed by St. 1964, c. 383, § 1, but in respects here pertinent was substantially reenacted by c. 383, § 2. The italicized language remained unchanged from the 1963 statute.

also known as Wood Island Park (marked [C] on the plan),[2] and by an area of tidal water (marked [E] on the plan). At the right of the plan appears the northwest end (marked [A] on the plan) of present Runway 15-33. This runway now extends southeast from the point marked [A] for a distance of 7,873 feet, to a southeasterly terminus, shown by the exhibits to be only a few hundred feet from the water's edge of Boston harbor and from the airport boundary. The paved surface of Runway 15-33 is 150 feet wide. It is used for instrument landings of turbo-jet aircraft.[3]



[2] The master and the parties have referred to the park as Wood Island Park as do we.

[3] The main runways of the airport are mostly south and east of the area shown in the plan. The air terminal is southwest of Wood Island Park at a point beyond the area shown on the plan.


BENNINGTON ST
MTA STATION
NEPTUNE RD
PRESTON ST
WORLD WAR MEMORIAL (WOOD ISLAND PARK)
PROPERTIES TAKEN AUGUST 1963
[B]
[C]
[D]
[E]
[F]
HARBOR
EDGE OF CLEAR ZONE FOR PRESENT RUNWAY
PROPOSED RUNWAY EXTENSION SIXTY FEET
WEST END OF EXISTING RUNWAY
[A]
RUNWAY 15-33
HANGAR AREA
TERMINAL BUILDING LIES IN THIS DIRECTION
DENOTES PROPERTY LINE OF MASSACHUSETTS PORT AUTHORITY AS DEPICTED ON CERTAIN EXHIBITS
NOTE: FROM ITS PRESENT WEST END AT POINT (A) RUNWAY 15-33 RUNS SOUTH-EAST 340 DEG. FOR 3738 FEET.
1000 500 0 1000



In 1962 and 1963, and in prior years, the Authority studied the possibility of extending Runway 15-33 so that it would be 10,000 feet long. The master found that this "extension contemplated an additional paved runway of" 2,127 feet. Exhibits indicate that this extension (shown as [D] on the plan) is to be made "over tidal flats" at the northwest end of the existing runway (from about point [A] shown on the plan to a line shown as [F]) to near the present high water line of the southeasterly shoreline of Wood Island Park.[4] Filling of the tidal flats in the harbor area (marked [E] on the plan) will be required and some fill already has been placed. Thus no property now or formerly belonging to these plaintiffs, and no taking of land not already owned by the Commonwealth or by the Authority, will be required "to extend physically . . . Runway 15-33 to a length of" 10,000 feet.

The Authority has removed a bridge providing access from Neptune Road to Wood Island Park and has constructed a fence which removes the park "effectively from public use for recreational purposes." Trees in the park have been cleared. Statute 1953, c. 528, provided that control of the park should be in the Metropolitan District Commission "until such time as the governor and council, upon request of the state airport management board, directs its transfer to said board for airport purposes." See St. 1955, c. 438. No actual or intended use of the park area for physical extension of the runway is proposed now, although use of the park will be required for a "clear zone"

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[4] Because the actual extension of Runway 15-33 was not to go northwest of the high water mark at Wood Island Park, only use of tidal area (and some airport land east of the tidal area) was involved. It was stipulated orally at the arguments, in effect, that any obstacles, presented by 1939 harbor lines (existing prior to 1966), to filling the flats in the tidal area (marked [E] on the plan) were removed by St. 1966, c. 733, §§ 1, 2.

(a matter discussed later in this opinion) when the runway is extended.

On October 31, 1961, the Authority made a request for Federal aid for its 1962 development program, including an item for property acquisition for approach, protection, and clearing in connection with Runway 15-33. On May 31, 1963, the Authority made an application (amended in June, 1963) "bearing upon a '1963 Grant-in-Aid Program'" containing a land acquisition "for Runway 15 Clear Zone." Both the 1961 and the 1963 proposed acquisitions included properties on Neptune Road then owned by the plaintiffs. A grant offer was made by the Federal Aviation Agency (FAA) to the Authority on June 28, 1963. This was accepted on June 28, 1963. The accepted grant offer thus became an agreement between the Authority and FAA (the 1963 grant agreement). See 49 U. S. C. § 1111 (1964); Federal Aviation Regs. § 151.31. The 1963 grant agreement provided that the Authority would not commence certain work on the property acquisition project until plans had been approved by FAA.[5] The master found (a) that apart from the 1963 grant agreement, there was no obligation on the part of the Authority to extend Runway 15-33, but (b) that the acquisition of the plaintiffs' properties became "a part of .... [the 1963] grant agreement." He also found that from "an aviation viewpoint, the ... extension of [R]unway 15-33 was and is ... desirable," and that "the removal of structures on ... Nep-

[5] A 1965 plan in evidence, approved by the Authority and by FAA, shows the 2,127 foot extension, but it is not shown that this 1965 plan bears direct relationship to the 1963 grant agreement. It does appear, however, that "extension of [R]unway 15-33 was divided into three phases," and that a contract for phase I involving a commitment of $509,052 has been awarded, but not completed because of the harbor lines problem now solved by the enactment of St. 1966, c. 733 (fn. 4, *supra*). That the general scheme of extending and protecting the runway has FAA approval is sufficiently apparent from the master's report and various exhibits.

tune Road would provide a greater factor of safety for all concerned."

Federal regulations [6] dealing with the Federal Aid to Airports Program require, in connection with Federal grants,[7] the acquisition, control, or protection of so called "runway clear zones" which are designed "to allow the unobstructed passage of aircraft landing or taking off from a runway." The master found that the plaintiffs' parcels on Neptune Road are all beyond a 2,500 foot "clear zone" from the present paved 7,873 foot Runway 15-33. These parcels, however, will be within a "clear zone" of 2,500 feet for Runway 15-33, if and when it is extended northwesterly as proposed (i.e. to point [F] shown on the annexed plan). The master justifiably concluded that "the structures upon the [plaintiffs'] premises, . . . [on] Neptune Road, do not constitute an obstruction to aviation within . . . applicable federal standards as . . . Runway 15-33 exists presently at a length of 7,873 feet, but that . . . [such] structures would constitute an obstruction . . . to aerial navigation, within . . . applicable federal standards, if and when . . . Runway 15-33 may be extended" to 10,000 feet.

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[6] See 49 U. S. C. § 1101 et seq. (1964), and 14 CFR (1967) §§ 151.7 (a), 151.9 and 151.11 (c). The regulations refer to Technical Standard Order N18 (TSO-N18) which provides that "an approach area" is 10,000 feet long "beginning 200 feet outward from the end of each runway and extending outward," ending 10,200 feet from the end of the runway. For "instrument runways" like Runway 15-33, there are special requirements.

[7] By the Federal statutes, the following principles are established. (1) Among the types of airport development contemplated is "acquisition of land . . . necessary to . . . mitigate . . . airport hazards," see § 1101 (8). (2) the administrator (to ensure, among other things, that the aerial approaches to an airport will be adequately cleared) "shall prescribe such . . . requirements . . . as he may deem necessary," see § 1110. (3) The administrator shall approve a project "only if he is satisfied that the project . . . will contribute to the accomplishment of the purposes of the" Federal statute. See § 1108 (d).

1. The master's report (although more restricted in its discussion of negotiations for the runway extension than would have been helpful) and the accompanying exhibits adequately establish that the Authority has long planned extending Runway 15-33 to 10,000 feet and that such an extension in a northwesterly direction can be done without taking by eminent domain land near Neptune Road or elsewhere for actual runway construction. Chapter 410 did not forbid extending the paved section of Runway 15-33 to the northwest over land which did not have to be taken by eminent domain after the effective date of c. 410. Nothing in c. 410 prohibited building a runway upon tidal flats of the Commonwealth or upon Wood Island Park, held for potential airport use at the discretion of the Governor and Council. See St. 1953, c. 528. Such an extension is plainly within the Authority's broad, general powers under St. 1956, c. 456.

Statute 1963, c. 410 (see fn. 1, *supra,* and related text of this opinion), by its exceptions (see italicized language at points [A], [B], and [C]), expressly permitted the Authority to make eminent domain takings, even "westerly of the present property line of the . . . [a]irport" (see point [D] of c. 410, as quoted) to meet Federal safety requirements and standards. No language confined the exceptions in c. 410 to existing runways. We see no justification for inserting in c. 410, by implication, language thus confining the exceptions. We interpret c. 410 as permitting the Authority to take land "westerly of the [airport's] present property line" to protect "the aerial approaches" to new or extended runways as well as to protect approaches to existing runways.

Examination of the 1963 grant agreement, and of the papers and exhibits leading up to it, shows that the purpose of the Neptune Road land acquisitions was to protect the aerial approach to Runway 15-33 from the northwest, and

that this purpose was approved by FAA as sufficiently improving aviation safety and operations to justify Federal aid under the statutes already cited (see fn. 7). The requirements of the 1963 grant agreement that the land be acquired, taken with the project of extending the runway, bring the takings ordered on August 8, 1963, within the exceptions to the prohibitions of St. 1963, c. 410.

2. The trial judge sustained the Authority's demurrer on two grounds, viz. (1) that (with respect to paragraphs of the bill pertinent to this issue) the plaintiffs have no standing in equity to question the Authority's use of Wood Island Park; and (2) that the plaintiffs have no standing to question the filling of tidal flats in violation of the 1939 harbor line, now changed by St. 1966, c. 733. The second ground of demurrer is no longer in issue (see fn. 4, *supra*) because of c. 733. We thus discuss only the first ground of demurrer.

The plaintiffs allege no facts, as giving them standing in this proceeding to seek equitable relief concerning Wood Island Park, other than their ownership of land on or near Neptune Road, references to the statutes concerning the park (St. 1949, c. 431; St. 1953, c. 528; St. 1955, c. 438), and statements that the Authority has cut off access to the park and has done, or proposes to do, construction work there. The proper public officer to protect park land by bill in equity is the Attorney General.[8] See *Jacobson* v. *Parks & Recreation Commn. of Boston,* 345 Mass. 641, 644. See also *Cabot* v. *Assessors of Boston,* 335 Mass. 53, 57-58; *Nickols* v. *Commissioners of Middlesex County,* 341 Mass. 13, 16-18 (in which, however, relief by mandamus was granted to enforce the trust there considered, see pp. 18-19,

[8] The Attorney General is not a party to this case. Although the docket shows that a former Attorney General filed a motion on February 10, 1966, for leave to intervene as a party defendant, it does not appear that the motion was allowed.

27). Cf. *Gould* v. *Greylock Reservation Commn.*, 350 Mass. 410 (mandamus). Under principles stated in the cases just cited, the demurrer was properly sustained on the first ground.

3. The Authority contends that this court should deal with certain matters not covered by the final decree. We think that decision of these issues is not necessary to terminate the controversy.

(a) The Authority suggests that the lands on Neptune Road taken by it do not lie "westerly of the present [airport] property line" within the meaning of St. 1963, c. 410 (see fn. 1, *supra*, and related text of this opinion).[9] Because we have concluded that the Authority's 1963 takings were proper under c. 410 in any event, we see no occasion for resolving now any ambiguity which may exist in c. 410 and its application to the airport property lines.

(b) There is also now no occasion, because we hold that the 1963 takings were valid, to determine whether the plaintiffs have standing in this proceeding to question their validity. For like reasons, we see no occasion to decide whether the plaintiffs (who certainly have long been vigorously protesting the Authority's proposals) are barred by laches.

4. The interlocutory decree, sustaining the Authority's demurrer on the first ground asserted, and the final decree are affirmed.

So ordered.

Vincent J. Celeste for the plaintiffs.
Donald R. Grant for the defendant.

[9] The quoted language from c. 410 is far from clear as applied to the Neptune Road area. From some of the exhibits, this area appears to be almost an enclave surrounded on three sides by airport land (see the annexed plan). It is northeast of some airport property, and southwest of other airport property. The master found that the record (apart from plans in evidence) contained "no transcripts of title or other sufficient evidence warranting determination of . . . the property lines of . . . [the a]irport."

Appendix B

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
No. 85004 Eq.

MARY LOSCHI et al.
v.
MASSACHUSETTS PORT AUTHORITY

FINAL DECLARATORY DECREE AFTER RESCRIPT

This cause came on to be further heard after the rescript issued by the Supreme Judicial Court for the Commonwealth on March 11, 1968, and was argued by counsel; and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The properties of the petitioners Mary Loschi, Margaret Cianci and Mary Pascucci which are described or referred to in the order of taking adopted by the Massachusetts Port Authority on August 8, 1963, and recorded in the Registry of Deeds for Suffolk County on September 5, 1963, in Book 7776, Page 228, were validly taken by said Authority by the exercise of the power of eminent domain "for the purpose of protecting the aerial approaches" to Runway 15-33 at General Edward Lawrence Logan International Airport "in accordance with applicable fed-

eral standards'' within the meaning of St. 1963, c. 410.

2. The properties of the petitioners Mary Loschi, Margaret Cianci and Mary Pascucci which are described or referred to in the order of taking adopted by the Massachusetts Port Authority on August 8, 1963, and recorded in the Registry of Deeds for Suffolk County on September 5, 1963, in Book 7776, Page 228, were validly taken by said Authority by the exercise of the power of eminent domain ''for the purpose of meeting runway clear zone requirements of the federal government'' with respect to Runway 15-33 at General Edward Lawrence Logan International Airport within the meaning of St. 1963, c. 410.

By the Court, (BEAUDREAU, J.)
(s) ROBERT BEAUDREAU
J.S.C.

Entered: March 21, 1968
A TRUE COPY

ATTEST:—
(s) THOMAS F. BROPHEY
Assistant Clerk

Appendix C

United States Constitution, Amendment XIV:

Section 1 ". . . No State shall . . . deprive any citizen of life, liberty, or property without due process of law; . . ."

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28 U.S.C. § 1257

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

14 C.F.R. § 11.29 Notice of proposed rule making.

(a) Each general notice of proposed rule making is published in the FEDERAL REGISTER, unless all persons subject to it are named and are personally served with a copy of it.

(b) Each notice, whether published in the FEDERAL REGISTER or personally served, includes—

(1) A statement of the time, place, and nature of the proposed rule-making proceeding;

(2) A reference to the authority under which it is issued;

(3) A description of the subjects and issues involved or the substance and terms of the proposed rule;

(4) A statement of the time within which written com-

ments must be submitted and the required number of copies; and

(5) A statement of how and to what extent interested persons may participate in the proceeding, as prescribed by §§ 11.31 and 11.33.

(c) A petition for extension of the time for comments must be submitted in duplicate not later than two days before expiration of the time stated in the notice. The filing of the petition does not automatically extend the time for petitioner's comments. Such a petition is granted only if the petitioner shows a substantive interest in the proposed rule and good cause for the extension, and if the extension is consistent with the public interest. If an extension is granted it is published in the FEDERAL REGISTER.

§ 11.31 Participation of interested persons in rule-making procedures.

(a) Each interested person is entitled to participate in rule-making proceedings by submitting written information, views, or arguments. In addition, he may comment on the original information, views, and arguments submitted by other persons, if, after receiving them, the Administrator considers it desirable.

(b) In any appropriate case, the Administrator also allows interested persons to participate in the rule-making procedures described in § 11.33.

§ 11.33 Additional rule-making proceedings.

(a) The rule-making procedure also includes any further procedural steps that best serve the purposes of a particular proceeding. For example, interested persons may be allowed to make oral arguments, participate in conferences between the Administrator or his representative and interested persons and organizations, appear at informal

hearings presided over by a designated FAA official at which a stenographic transcript is made, or participate in any other procedure whenever it is desirable and appropriate to assure informed administrative action and adequate protection of private interests.

(b) Any appropriate combination of the procedures described in paragraph (a) of this section may be used in addition to the basic procedure of allowing interested persons to participate in rule-making proceedings by submitting written information, views, or arguments.

Acts, 1963.

Chap. 410. An Act prohibiting the expansion of the Logan airport or the construction of hangars in a westerly direction therefrom.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is forthwith to protect the public interest by preventing the expansion of the Logan Airport in a westerly direction or the construction of hangars in such direction, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

The Massachusetts Port Authority, created by section two of chapter four hundred and sixty-five of the acts of nineteen hundred and fifty-six, shall not, except for the purpose of protecting the aerial approaches to runways in accordance with applicable federal standards, meeting runway clear zone requirements of the federal government, providing for the installation of navigational and landing aids required by the federal government, or meeting other air safety requirements of the federal government, acquire by the exercise of the power of eminent domain for airport purposes any land above mean high

water in the East Boston district of the city of Boston westerly of the present property line of the General Edward Lawrence Logan International Airport, nor shall said Authority build, cause to be built nor allow to be built any hangar, or allow the operation of any aircraft, on land owned by it and lying southwesterly of Porter street and westerly of the existing airport service road running between Porter street and Maverick street.

Approved May 16, 1963.

FILED
JUN 27 1968
JOHN F. DAVIS, CLERK

No. 177.

In the Supreme Court of the United States

OCTOBER TERM, 1968

MARY LOSCHI ET AL.,
PETITIONERS,

v.

MASSACHUSETTS PORT AUTHORITY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF THE MASSACHUSETTS PORT AUTHORITY IN OPPOSITION

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IN THE

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MARY LOSCHI ET AL.,
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MASSACHUSETTS PORT AUTHORITY,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF THE MASSACHUSETTS PORT AUTHORITY IN OPPOSITION

Opinion Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported under the name of *Loschi* v. *Massachusetts Port Authority* and appears in Mass. Adv. Sh. (1968) 437 and in 234 N.E. 2d 901. It is reprinted as Appendix A to the petition for certiorari (pp. 18-28), and all references herein to that opinion will reflect the pagination of that reprint.

Jurisdiction

The jurisdictional statement of the petition (p. 2) neglects to advise this Court that under date of March 20, 1968, the Supreme Judicial Court denied a petition for rehearing. It also fails to disclose that on April 28, 1968, the Justice of the Superior Court who had entered the original decree reviewed by the Supreme Judicial Court entered an order dismissing a further appeal from the final declaratory decree which was entered after rescript from the Supreme Judicial Court (App. B, pp. 29-30).[1] Finally, it ignores the fact that on June 4, 1968, six days before the filing of the present petition, the petitioner Mary Pascucci gave the respondent a release of all claims and demands arising out of the takings complained of, a confirmatory deed to the premises taken from her, and an agreement in writing for the disposition of her prior petition for the assessment of damages arising out of the takings (R. 60).

The Questions Not Presented

None of the questions sought to be framed in the petition (pp. 2-3) was presented to the Superior Court of Massachusetts in the first instance or to the Supreme Judicial Court of Massachusetts on review. The petitioners have not complied, and can not comply, with the provisions of Rule 23(1)(f) of this Court because, as will be seen (*infra*, pp. 5-7), the "Questions Presented" (Pet., pp. 2-3) do not exist on this record.

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[1] Such action is permitted by the applicable statute (Mass. G.L. c. 231, § 133, as amended) only if "the justice by whom or by whose order the decree [after rescript] was entered . . . deems that . . . the appeal is claimed merely for the purposes of delay."

Statement of the Case

The respondent Massachusetts Port Authority (the Authority) is a body politic and corporate created by the Massachusetts Legislature (Mass. St. 1956, c. 465, as amended) for the purposes, among others, of owning, operating, maintaining, enlarging and improving Logan International Airport in the East Boston District of the City of Boston. *Massachusetts Port Authority* v. *Clerk of the East Boston District Court,* 350 Mass. 195, 202. *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52, 55, cert. denied 385 U.S. 947. It was given the power of eminent domain by its Enabling Act [Mass. St. 1956, c. 465, § 3(g) and (k)]. Thereafter, in 1963, the Massachusetts Legislature saw fit to restrict the powers of its creature by enacting Mass. St. 1963, c. 410 (App. C, pp. 33-34), which took effect on May 16, 1963, and which provided that the Authority could not acquire land by eminent domain "westerly of the present property line of the . . . airport" except for certain specified purposes, which included "protecting the aerial approaches to runways in accordance with applicable federal standards [and] meeting runway clear zones of the federal government."

The order of taking which was contested in this case was adopted by the Authority on August 8, 1963 (App. A, p. 18). Properties were specifically taken from the petitioners Loschi, Cianci and Pascucci (Pet. pp. 4, 8, 11; App. B, pp. 29-30) but not from any of the petitioners Miraglia, McWhinnie, Baptista or Oliver (Pet., pp. 4, 7, 8). The principal question for decision below was whether the properties of the first three named petitioners had been taken for one or more of the purposes permitted by Mass. St. 1963, c. 410 (App. C, pp. 33-34).

There is no question that those properties were taken in furtherance of the Authority's plans for a 2127 foot

northwesterly extension of Runway 15-33 at Logan Airport to a total length of 10,000 feet. It is quite clear from the plan which accompanies the opinion of the Supreme Judicial Court (App. A, p. 21) and from the opinion itself that the physical extension of the runway does not project beyond the former high water mark of Wood Island Park, that to reach that point no land had to be acquired which was not already owned by the Commonwealth of Massachusetts or by the Authority, and, specifically, that Wood Island Park did not have to be and was not taken by the Authority (App. A, pp. 23 [and fn. 4 thereon], 26). Indeed, a study of the statutory provisions with respect to Wood Island Park which were cited below will disclose that the park was owned by the City of Boston as long ago as 1949, when the city was authorized to convey it to the Commonwealth "to become a part of . . . Logan Airport and subject to all laws pertaining to said airport" (Mass. St. 1949, c. 431, § 1) and that the park and a subsequent addition thereto (Mass. St. 1955, c. 435) were, as the court said, "held [by the Metropolitan District Commission[2]] for potential airport use at the discretion of the Governor and Council" pursuant to the provisions of Mass. St. 1953, c. 528, and Mass. St. 1955, c. 438 (App. A, pp. 26, 23).

Both courts below held that the properties of the first three petitioners had been taken for two of the purposes permitted by Mass. St. 1963, c. 410, namely, for the "purpose of protecting the aerial approaches to [Runway 15-33] in accordance with applicable federal standards" and for the "purpose of meeting runway clear zone requirements of the federal government" with respect to that runway (App. A, pp. 18-19, 26-27, 28; App. B, pp. 29-30). Both courts also held that none of the petitioners had any standing to question the Authority's use of Wood Island Park for airport purposes (App. A, pp. 18, 27-28).

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[2] An agency of the Commonwealth.

Argument

The first question sought to be presented by the petition (pp. 2-3) is whether under the Due Process Clause of the Fourteenth Amendment the four petitioners from whom properties were not specifically taken (Miraglia, McWhinnie, Baptista and Oliver) "have standing to challenge the validity of *intervening takings* that will bring the runway and its 'clear zone' into immediate proximity with their properties and result in a taking of their properties under the doctrine of *United States* v. *Causby,* 328 U.S. 256 and *Griggs* v. *Allegheny County,* 369 U.S. 84" (emphasis supplied). It is clear that the words "intervening takings" do not have reference to the properties specifically taken from the petitioners Loschi, Cianci and Pascucci because all seven petitioners were named as parties in the original bill of complaint (R. 1-3), continued to be parties until the conclusion of the case (R. 119-121), and were in fact permitted to litigate the takings made from only three of them. Even a cursory reading of Part I of the petitioners' Argument will disclose that the "intervening takings" postulated in the question can only mean a supposed taking of Wood Island Park (Pet., pp. 8, 9, 10). As we have already seen (*supra,* p. 4), Wood Island Park had been publicly owned and subject to possible appropriation for airport purposes as early as 1949 and was not taken by the Authority in 1963. The fundamental postulate of the first question falls, and so does the question.

The same is true of the second question, which is stated to be whether under the same Due Process Clause the three petitioners from whom properties were taken (Loschi, Cianci and Pascucci) "have standing to challenge the validity of *intervening takings,* where the taking of their properties would not be required by federal safety standards if the *intervening takings* are invalid" (Pet., p. 3;

emphasis supplied). Study of Part II of the Argument reveals that once again the words "intervening takings" have reference only to Wood Island Park (Pet., p. 11), which was not taken by the Authority. The major premise of the question is false, and so is the issue sought to be presented.

Both parts of the third question rest on the express assumption that "the state court held [that] a grant of money by the Federal Aviation Agency for an airport runway extension upon application by an airport authority *ipso facto* constitutes the establishment of a federal safety standard" (Pet., p. 3). The assumption becomes an assertion at no less than eight different points in Part III of the Argument (Pet., pp. 12, 13, 14, 15, 16-17, 17). The assumption (assertion) is based on a misreading or complete misunderstanding of what the Supreme Judicial Court did and said. The problem before that court was to determine the purpose(s) of the takings and whether permitted by the express provisions of Mass. St. 1963, c. 410 (App. C, pp. 33-34). The court did look at the background, language and contents of the 1963 grant agreement between the Authority and the FAA[3] by which the latter promised to participate in the cost of acquiring the properties taken (App. A, pp. 23, 24, 25, 26), but it is clear from the opinion that the court did so only in order to identify the actual purposes of the takings (App. A, pp. 26-27). The court seems to have assumed, quite properly, that the FAA would not have executed the grant agreement without first being satisfied that the clear zone planned for the extended runway would meet the standards previously established

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[3] The grant agreement is not found in the printed record which is before this Court. It is one of the fifteen exhibits certified in original form to the Supreme Judicial Court (R. 123) but is not included in what appears to have been certified to this Court in supposed compliance with the provisions of Rule 21(1).

under the rules and regulations cited in footnote 6 to the opinion (App. A, p. 25), but it never held, or even suggested, that the agreement itself determined, or constituted the establishment of, a new or particular safety standard peculiar to Runway 15-33.[4] It follows that the third "question" stated in the petition (p. 3) does not even exist on this record.

None of the arguments made to this Court was presented to either of the courts below. A glance at the petitioners' brief before the Supreme Judicial Court[5] will disclose absolutely no reference to *Causby* or *Griggs*, to any subsequent case dealing with the doctrine of those cases, or even to the doctrine itself.[6] As this Court has recently said, "the record relevant to the constitutional claims now asserted is insufficient to permit decision of those claims." *Johnson* v. *Massachusetts*, U.S. , 88 S. Ct. 1115. Further, the brief does not even contain any reference to the Federal Airport Act (49 U.S.C. §§ 1101 et seq.) or to any of the rules and regulations promulgated by the Administrator of FAA under authority of 49 U.S.C. § 1354(a) which originally appeared in 27 F.R. 12349 and are now found in 14 CFR §§ 151.1 et seq. Much less was there any argument as to the validity, application or proper interpretation of any statutory or regulatory provision which may be pertinent. It is manifest that no substantial Federal question was, or can now be, presented. Quite to the contrary, the only question presented or considered was solely

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[4] The Authority does not understand the argument advanced at pages 15 to 17 of the petition to assert that the petitioners had any right to prior notice of or hearing on any question involving the proper application of any previously existing rules or regulations such as those noted by the Supreme Judicial Court.

[5] A copy is attached to the Authority's opposition to the petitioners' application for stay filed under 28 U.S.C. § 2101(f).

[6] The Supreme Judicial Court's Full Court Rule 1:13 provides that "The court need not pass upon questions or issues not argued in briefs." 351 Mass. 731, 738.

a State question as to the proper interpretation of an act of a Legislature which wished to curtail the exercise of the broad power of eminent domain which it has previously delegated to its own creation.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,
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